

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

RONALD EMERY JONES,

Petitioner

V.

NO. 3:94CV141-B-D

EDWARD HARGETT, ET AL,

Respondents

O P I N I O N

This cause comes before the court on the petition of Ronald E. Jones, for writ of habeas corpus pursuant to 28 U.S.C. §2254.

Petitioner was convicted of armed robbery in the Circuit Court of Lafayette County, Mississippi, on November 20, 1992, and was sentenced to 9 years confinement. Petitioner states that on or about February 25, 1993, his counsel filed notice of appeal to the Mississippi Supreme Court; on May 17, 1993, the appeal record was filed; on June 21, 1993, petitioner's appellate brief was filed; and on July 27, 1993, the brief was mailed to the Mississippi Attorney General. The appeal is currently pending before the Mississippi Supreme Court.

Petitioner lists eight grounds for relief; 1) denial of right to speedy trial; 2) denial of right to speedy appeal; 3) unconstitutional suppression of victim's involvement and suppression of exculpatory evidence; 4) prosecutor's improper comments on petitioner's in-court behavior; 5) bias of the trial judge; 6) improper remarks by prosecutor on petitioner's not

testifying at trial; 7) trial court's improper denial of a defense request continuance; and 8) denial of bail pending appeal.

It is well settled that a state prisoner seeking habeas corpus relief in federal court is first required to exhaust his available state remedies. 28 U.S.C. §2254(b) and (c)¹; see also Rose v. Lundy, 455 U.S. 509 (1982). More specifically, a petitioner must present his claims to the state courts in such a fashion so as to afford those courts a fair opportunity to rule on the merits. Picard v. Conner, 404 U.S. 270 (1971); Dispensa v. Lynaugh, 847 F.2d 211, 217 (5th Cir. 1988). A habeas corpus petitioner must provide the state's highest court with a fair opportunity to pass upon the issues raised in the petition for federal habeas corpus

¹ 28 U.S.C. §2254(b) and (c) provide:

- (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
- (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

relief. Dupuy v. Butler, 837 F.2d 699, 702 (5th Cir. 1988) (citing Carter v. Estelle, 677 F.2d 427, 443-44 (5th Cir. 1982)). Therefore, since petitioner has a direct appeal currently pending before the Mississippi Supreme Court², his state remedies have not been exhausted and this petition is premature.

The exhaustion doctrine will not be applied when the state system inordinately and unjustifiably delays review of a petitioner's claims so as to impinge upon his due process rights. Shelton v. Heard, 696 F.2d 1127, 1128-29 (5th Cir. 1983). Petitioner's appellate brief was filed in the Mississippi Supreme Court on June 21, 1993. This time is not so excessive or egregious as to affect petitioner's due process rights. See Sands v. Cunningham, 617 F.Supp. 1551 (D.C.N.H. 1985) (a twenty-nine months delay between oral argument and rendering of decision on appeal was not so prejudicial as to violate petitioner's due process rights); Gimenez v. Leonardo, 702 F.Supp. 43 (E.D.N.Y. 1988) (delay of more than three years from conviction to perfection of appeal not excessive). There is no indication that petitioner's appeal is being inordinately delayed that would defeat the exhaustion doctrine.

Finally, there is no constitutional right to bail pending appeal. U.S. v. Kowalik, 765 F.2d 944 (10th Cir. 1985). The posting of a bond pending appeal in a criminal case is left, in the first instance, to the discretion of the state trial court. U.S.

² Petitioner may also have a remedy under the Mississippi Uniform Post Conviction Collateral Relief Act, §§99-39-1, et seq. Miss. Code Ann. (1993 Supp.).

v. Shaw, 920 F.2d 1225, 1231 (5th Cir. 1991); cert. denied, 111 S.Ct. 2038 (1991). The standard on appeal is whether the lower court abused its discretion. Id. Petitioner has not demonstrated such abuse. Moreover, a federal court is precluded from substituting its judgment for that of the state court unless it clearly appears that the state court's action was wholly beyond the range within which a rational judgment could be based. U.S. ex rel. Rainwater v. Morris, 411 F.Supp. 1252 (N.D. Ill. 1976). Due to the seriousness of the offense of which defendant stands convicted, this court cannot say that the state court's denial of bail is beyond the range of rational judgment.

Accordingly, it is the opinion of the court that his petition should be dismissed without prejudice for failure to exhaust all available state remedies. A final judgment in accordance with this opinion will be entered.

THIS the _____ day of _____, 1994.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE